RIGHTS STUFF

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Obesity As a Disability

In 2008, the Burlington Northern Santa Fe Railway Company (BNSF) made Eric Feit a conditional offer of employment as a conductor trainee. Before he could be hired, he had to pass a physical exam and complete other requirements. After his medical exam, BNSF told Feit that he was not qualified for this safety sensitive position because of the "significant health and safety risks associated with [his] extreme obesity." BNSF said they would not consider Feit for a job unless he lost 10% of his body weight or successfully completed additional medical exams at his own expense. Even if he did either one of these, he still would not be guaranteed a job.

Feit completed several additional medical exams at his own expense, but did not complete a sleep study test that cost $1,800. He was trying to lose 10% of his body weight. But because he was still considered obese, he was not offered a job. He sued BNSF for disability discrimination under Montana law.

The Court noted that when the Americans with Disabilities Act (ADA) was first passed, most courts that considered the issue found that "obesity is not an impairment unless it is the result of a physiological disorder or condition." In other words, if Feit was overweight merely because of poor diet and exercise habits, he would not be a qualified individual with a disability under the ADA. Only if an underlying medical condition caused his obesity would he be protected.

But since the ADA was passed in 1990, it has been amended by Congress (the ADA Amendments Act, or ADAAA) and interpreted by the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC's regulations say that being overweight, in and of itself, is not typically a disability, but "severe obesity, defined as body weight more than 100% over the norm...is clearly an impairment." Such obesity does not have to be based on a physiological impairment to qualify as a disability. Thus, the Court found that "obesity that is not the symptom of a physiological disorder or condition may constitute a physical or mental impairment within the meaning of" Montana law.

Four members of the Montana Supreme Court ruled in favor of Feit, but three members dissented. One judge wrote that the original guidelines that required a physiological cause for the obesity had not been changed. Two other judges noted that Montana had not amended its human rights law to reflect changes in the federal ADA, and that Feit was denied a job before the ADAAA went into effect.

The case is BNSF Railway Company v. Feit, 365 Mont. 359 (MT S. Ct. 2012). This issue may well eventually be resolved in the U.S. Supreme Court.

BHRC Staff

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Carolyn Calloway-Thomas

Valeri Haughton

Beth Applegate

Birk Billingsley

Mayor
Mark Kruzan

Corporation Counsel
Margie Rice

BHRC
PO BOX 100
Bloomington IN
47402
349.3429
human.rights@
bloomington.in.gov

Sometimes Proving Discrimination is Easy

It can be hard to prove discrimination occurred, as supervisors who harbor biases are typically unlikely to be forthright about their motives. But some supervisors are still willing to be quite un-PC in their conversations.

Bailey Stoler worked for the Institute of Integration Nutrition beginning in 2010. She was quickly promoted and in about a year was in charge of two departments, managing 32 people. In late 2011, she told her supervisor she was pregnant and intended to take maternity leave. Her supervisor told her that in his experience, "women's priorities shift when they become mothers" and that she could consider that when planning her leave. Two weeks later, he told her that her position might not be the same when she returned, but she should not be concerned about losing her job.

Stoler had her baby and let her employer know she was ready to return to work. Her supervisor told her that the company had too many managers, that he needed to figure out a role for her, and to not report to work as scheduled. When she did return, she was demoted two levels below her previous job and was no longer managing employees. She was told she had to prove herself before she could get her old job back, and she went from having a private office to working in a cubicle. When she complained to HR, her supervisor told her that she was making her allegations up and that she had been "in a very soft world with her baby for the past few months so the work world felt very harsh and aggressive to her" and that she was in "culture shock from being home with the baby." She lost her eligibility for bonuses, which had amounted to almost half of her compensation. And the company posted a job opening for her previous job.

Stoler went back to HR and was told to stop re-hashing her prior grievances. She was warned that continuing to engage in a debate about these matters was a distraction that could have negative impacts on the business. Then the company fired her, saying her position had been eliminated. The company then offered her an entry-level position that paid 30% of the pay she received before her maternity leave.

Amy Hess began working for the company in 2011, managing 15 to 18 employees. When she informed her supervisor that she was pregnant, she was told that he had "never met a new mom who didn't underestimate the sleep, time and exhaustion from a new baby." He expressed concern that her work performance would decline. The company then significantly changed her job duties and pay without explanation. The company listed her old job and fired her ten days before the start of her maternity leave. They hired a man to replace her.

Jessica Marcus began working for the company in 2011. She announced in the fall that she was getting married. Stoler, who still worked for the company at that point, strongly recommended that Marcus be promoted. But her supervisor said that since Marcus was getting married, "her head was in another place." Instead, the company promoted another woman, a woman listed on the company's "Maternity Projection Chart" as not likely to have a child within the next five years.

During 2012, Marcus received great reviews and was promoted. But late in the year she announced that she was pregnant. The next day, her supervisor told her they were discussing whether to retain her. Her job duties were significantly reduced and assigned to an unmarried woman with no children.

The three women sued, alleging pregnancy discrimination in the workplace and violation of the Family and Medical Leave Act. The company moved to dismiss the case, but it will go forward to trial. The plaintiffs had alleged sufficient information to allow the case to go to a jury, based on the numerous comments made by supervisors and the "Maternity Projection Chart."

The case is Stoler v. Institute for Integrative Nutrition, 1013 WL 6068598 (S.D. New York 2013).

Is it Illegal to Fire a Pharmacist Because of His History of Substance Abuse?

Under the Americans with Disabilities Act, it is illegal to discriminate against someone who has a history of drug abuse, if the history is not recent and there is evidence that the person has had treatment. A current drug user is not protected by the law.

James Bryan became a licensed pharmacist in 1996. In 2002, he became addicted to prescription drugs. His license was suspended for five years. He completed a supervised rehabilitation program and in 2007, was able to get his license reinstated. One of the conditions of his reinstatement was that he has to tell every employer and manager at any pharmacy that employs him about his license suspension.

A few months later, Walmart hired Bryan as a pharmacy intern. As required, Bryan disclosed his suspension record. The next year, Walmart promoted Bryan to staff pharmacist and for the next three years, gave him strong job performance reviews.

But in October, 2011, Walmart fired Bryan, allegedly because of a new company policy that says that anyone with a history of adverse action by a state board of pharmacy would no longer be eligible for employment. Bryan filed a complaint alleging discrimination in employment on the basis of disability with the Equal Employment Opportunity Commission and in October 2013, filed a law suit against the company. The lawsuit says it is being filed on behalf of a proposed class of "hundreds or thousands" of people who have been or could be denied employment by Walmart because of this new policy.

This is one of those cases where it is easy to argue both sides. Certainly we want to give people second chances. Bryan complied with all of the requirements of the state pharmacy board and apparently has been drug-free for more than a decade. But it is easy to understand Walmart's position as well.

Walmart has not yet filed its answer to the complaint, which is pending in federal district court in the State of Washington. Bryan v. Walmart Stores, Inc., Western District of Washington at Tacoma (2013).

Project Lifesaver is Coming to Monroe County

Project Lifesaver is used with at-risk individuals with impaired judgment and memory loss such as severe autism, Alzheimer's and Downs Syndrome. Personal tracking devices are placed on individuals who are at risk of wandering. The devices are lightweight, battery operated and may be worn on the wrist or ankle. If the person wearing the device cannot be found, first responders use their tracking equipment to help locate him or her. Using this device, search time has been reduced from nine to 12 hours to an average of 30 minutes.

Locally, the Van Buren Township Fire Department is coordinating this program. The department is working with donors and hopes to be able to provide the devices to people in need at no cost to the individuals beginning early this year.

According to organizers, more than 2,700 searches have been conducted with Project Lifesaver with a 100% success rate. All of the missing individuals were found alive.

The transmitters emit an automatic tracking signal every second, 24 hours a day. The signal is not audible to humans. Each transmitter has a unique radio frequency, enabling trained personnel to dial in the frequency and begin their search. The batteries have to be replaced each month, and caregivers must complete a daily check on the device. The devices are designed to be resistant to removal by the person wearing them.

For more information, call the Van Buren Township Fire Department at 825.9500 or Lt. Paul Ford, Project Lifesaver coordinator, at 360.251.

City Seeks Public Input on Draft Update of Americans with Disabilities Act Transition Plan

As part of the City of Bloomington's ongoing effort to comply with the requirements and intent of the Americans with Disabilities Act (ADA), the City is seeking public input on a draft version of an update to its ADA Transition Plan. The City of Bloomington prepared its first ADA Transition Plan in 1990 and has updated it several times since then.

The ADA requires public agencies with more than 50 employees to maintain an up-to-date Transition Plan, which should survey accessibility barriers in programs and services and provide a plan to remove them. Title II of the ADA prohibits state and local governments from discriminating against people on the basis of their disability and from excluding people from participation in programs, services or activities because of their disability.

The City of Bloomington's draft update of its ADA Transition Plan can be accessed online at www.bloomington.in.gov/planning. A printed version is available for review at the Monroe County Public Library, 303 E. Kirkwood Ave., in the Indiana Room. Printed and Braille versions of the plan will also be available in the Planning Department office at City Hall, 401 N. Morton St., Suite 160.

Residents have the opportunity to provide input on the draft plan until February 28. Written comments can be sent to the Planning Department via email at planning@bloomington.in.gov or by mail to 401 N. Morton St., Suite 160, Bloomington, IN 47404. Residents also may comment by contacting the Planning Department directly at 349.3423.

Cargill to Pay More Than $2.2 Million to Settle Hiring Discrimination Charges

Federal laws and executive orders, including Section 503 of the Rehabilitation Act, The Vietnam Era Veterans' Readjustment Assistance Act and Executive Order 11246, prohibit federal contractors from engaging in discriminatory practices. These laws are enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

OFCCP reviews federal contractors' records and practices to make sure the contractors are in compliance. During a scheduled review of Cargill Meat Solutions in Kansas, OFCCP found evidence that Cargill's hiring practices were in violation of the laws. They found reason to believe that Cargill was discriminating against applicants and employees on the bases of sex, race and/or ethnicity. They also found that Cargill was not maintaining its records in accordance with the law.

The Department of Labor filed a law suit, and recently announced a settlement. Cargill will pay more than $2.2 million in back wages and interest to the affected individuals. Cargill will also make 354 job offers to the affected workers as jobs become available. The company also agreed to undertake extensive self-monitoring measures to ensure that all hiring practices fully comply with the law, including record-keeping requirements.

Since 2005, Cargill has held federal contracts worth more than $1.4 billion.

If you have questions about the work of the OFCCP, call 1.800-.397.6251 or visit www.dol.gov/ofccp. If you have questions about fair employment practices in general, please contact the BHRC.